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In the

# Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

MARION J. BELVEAL, ET AL.,

*Petitioners,*

*v.*

SOCONY MOBIL OIL CORPORATION,
CHARLES B. ATHEY AND JACK D. HODGDEN,

*Respondents.*

*On Petition for a Writ of Certiorari to the Court of Civil Appeals for the Eighth Supreme Judicial District of Texas, Sitting at El Paso, Texas.*

## BRIEF FOR RESPONDENTS CHARLES B. ATHEY AND JACK D. HODGDEN IN OPPOSITION

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*Respondents.*

*On Petition for a Writ of Certiorari to the Court of Civil Appeals for the Eighth Supreme Judicial District of Texas, Sitting at El Paso, Texas*

## BRIEF FOR RESPONDENTS CHARLES B. ATHEY AND JACK D. HODGDEN IN OPPOSITION

### OPINIONS BELOW

The opinion of the Court of Civil Appeals for the Eighth Supreme Judicial District of Texas is reported in 430 S.W. 2d commencing at page 529. The opinion "reversed and remanded for trial" the summary judgment that had been rendered in a state trial court favoring Petitioners, (then plaintiffs), against Respondents Charles B. Athey and Jack D. Hodgden, who were then and now are defendants in the cause. The Supreme Court of Texas on March 5, 1969 declined to review the state court decision.

## JURISDICTION

This Court does not have and therefore should not exercise jurisdiction hereof for the reasons:

1. The decision of the state court is an interlocutory judgment as between Petitioners and Respondents Athey and Hodgden. Being such, it is not subject to the review that is being asked for against such named Respondents.

2. The decision of the state court rests on non-federal grounds as between Petitioners and Respondents Athey and Hodgden.

## QUESTIONS PRESENTED

1. Does this Court have jurisdiction?

2. Assuming the state court decisions as being "Final judgments or decrees" that "may be reviewed" by "writ of certiorari"; and that this Court will undertake to determine local laws: Did the Texas court properly determine and then apply the controlling Texas law?

## STATEMENT OF THE CASE

The part of the court opinion that favors Respondents Athey and Hodgden, the part that Petitioners now ask the Supreme Court to review, remanded this case for a complete trial as between Petitioners and such named Respondents. The case was remanded for trial so that the issues could be decided with a jury trial that had started on January 11, 1967 when a jury later discharged was regularly selected and empaneled to decide the fact issues

that were then regarded as being in existence as between Petitioners and the Respondents last named.

The case that the state court decided needs be tried by a jury was filed February 28, 1966 (State Record Transcript, p. 48) when Petitioners, all residents of Oklahoma (excepting one whose residence was in California) "individually and as heirs of Myrtle Belveal, deceased, Ida Oberg, deceased, and Milda Belveal, deceased" presented their original petition in a Texas state court complaining against Respondents Athey and Hodgden (who also lived in Oklahoma, Tr. p. 2). The suit likewise was against a Respondent sued as "Socony Mobil Oil Company" a New York corporation. J. K. Brim, Jr., a Texas resident against whom no relief is sought in this Court or was sought in the state court appeal, also was named as a defendant in the state trial court. The suit was filed and was then answered as a case that involved title to Texas lands. The case, as filed, was considered to be a case controlled by Texas rules of law and by that state's Rules of Civil Procedure. The prayer of Petitioners' petition then filed was for "judgment for title and possession of their property in Pecos County, Texas, and interest of plaintiffs therein as described in the deeds attached hereto as Exhibits 'E', 'F', 'G', 'H', 'I', 'J', and 'K' with writ of possession * * *" (Tr. p. 20). The seven recorded deeds that were copied to be a part of "Plaintiffs' Original Petition" are also shown into this record as the Exhibits E-K (Tr. pp. 648-661) that were attached to and thereby included to be a part of Plaintiffs' Fourth Amended Petition (Tr. p. 580) on which Petitioners have dependance in this Court. Respondent Athey was the

Grantee named in each of the above referred to deeds. These deeds are the "set" of "Texas forms" that are referred to in the Court of Civil Appeals opinion (p. 538 (8)). Such deeds were executed, acknowledged and delivered soon after the delivery of the seven deeds of the identical Grantors which first executed and delivered deeds the Court of Civil Appeals has referred to "on 'Oklahoma forms'," which said deeds each bear the "Made" date "29th day of March, A.D. 1962". Those deeds were the ones that had been prepared to accompany and that are referred to in and that did accompany the Stickelber letters of March 29, 1962 that Petitioners have shown as "Exhibit D" attached to their first (Tr. p 34) and fourth (Tr. p 647) petitions filed in this cause. Respondent Athey paid $105,000.00 out of his own funds for the above referred to fourteen deeds. The day of payment, how made and paid by him is noted on the picture copies of the "Oklahoma Forms" of deeds that are pictured at pages 15-21 of the Appellant's Brief that Respondent Jack D. Hodgden filed in the Texas Court of Civil Appeals. The said deeds are further identified into the record of this case through the depositions of Petitioners Marion J. Belveal (Cook transcription, pp. 59-60, 66-68); of Mrs Branom (pp. 81, 93, 95, 98); of Dudley Branom (p. 18) and of Will Wyler (pp. 6-7). The decedents hereinabove named, (Mrs. Myrtle Belveal, Mrs. Ida Belveal Oberg and Mrs. Milda Belveal Wyler) in their respective lifetimes made no attack whatever against the deeds that they respectively delivered and for which delivery each received a $15,000.00 cash payment.

The interests in lands that were conveyed to Respondent Charles B. Athey by the above referred to deeds, fourteen in number, were interests in lands that Frank M. Belveal and his wife, Myrtle G. Belveal acquired, as community property, through a purchase that was made in the late 1920's. Mr. Frank M. Belveal died intestate, leaving his wife and all of his children surviving him. After the foregoing fourteen deeds of this case were executed by Mrs. Belveal as a surviving wife and by all of the Belveal children, Mrs. Myrtle G. Belveal, the mother, died intestate. Mrs. Ida Belveal Oberg, a childless daughter, also died, a widow. Mrs. Milda Belveal Wyler, also a daughter, died intestate leaving her husband, Petitioner Will Wyler, and two children, Petitioners Ernest Wyler and Eldabel McKenzie (and her husband) surviving her. In the Court of Civil Appeals opinion that Petitioners here attack it was held and stated:

> "(2, 3) Plaintiffs pleaded and admitted the execution and delivery of the deeds, their acceptance and retention of the consideration, and the present posession of the land by the defendants". (p 532).

The Court of Civil Appeals decision also found and stated that the Texas forms of deeds (Petitioners' Exhibits E through K above referred to), "were executed and delivered", "About a week after the delivery" of the Oklahoma forms of deeds that are pictured in Respondent Hodgden's Appellant's Brief in the Court of Civil Appeals at pages 15-21 thereof.

Petitioners started this litigation with a 47 page "Original Petition" (Tr. pp 2-48). Respondents Athey and Hodgden answered the suit in a way that was called for by the Texas

Rules of Civil Procedure adopted by the Supreme Court of Texas in the early 1940's. Respondent Athey, under those rules, presented his plea of abatement to the trial court and asserted that there was an absence of a necessary party to this cause. (Tr. pp. 438-441). The Court of Civil Appeals opinion sustained Respondent Athey's contention, stating that the trial court judgment that was "reversed and remanded for trial" was "also erroneous in that there is an absence of necessary parties, which absence was raised by pleas to abate and was not cured * * *" (9) p. 534). Respondent Athey also answered with a formal plea of "not guilty" (Para. 6, Tr. p. 448) in a way provided by Rule 788 of the Texas Rules of Civil Procedure adopted by the Texas Supreme Court. Respondent Athey further pleaded 26 pages of defensive matters that, among other things, asserted that the price and sum of money ($105,000.00) that was paid for the above referred to conveyances, fourteen in number, represented "The price and sums of money * * * that the said Grantors of two sets of deeds and plaintiffs themselves asked for their said conveyances and for the sale of interest in the properties that they made" (Tr. p. 449). The price that was paid was alleged as being "the reasonable April, 1962 price and value of said property and interest in properties that the plaintiffs and the said Grantor had and held." (Tr. p. 449). Respondent Athey also plead that there was nothing wrong with the conveyances that Petitioners seek to set aside. He also said that the price he paid was not stated by him or by Respondent Hodgden but instead "was the price that was first determined and then stated" by the plaintiffs and by the Grantors (Tr. p. 449).

The deposition proof that was before the Court of Civil Appeals and also before the trial judge, disclosed that those who executed and delivered the deeds of this case, finally decided to accept the price of $105,000.00 which they asked, during the time of a meeting in Enid, Oklahoma, during which meeting a long distance telephone call from Texas became received by Petitioner Marion J. Belveal. This call from a prospective buyer brought an offer to buy and pay for on basis of payment of "$400.00 per acre after they examined title" (Petitioner Marion J. Belveal's deposition, Cook transcription, p. 118). Please see the documentation of that call as such is stated at page 148 of the "Appellant's Brief" that Respondent Athey filed in the Court of Civil Appeals; also the documentation concerning such call as such appears at pages 34-36 of Respondent Hodgden's Appellant's Brief that was filed in that Court.

Respondent Athey specially denied in his pleading that there was a confidential or fiduciary relationship between him and Petitioners or the Grantors in the deeds that were delivered to him. He plead that he was under no duty nor obligation to Petitioners in any of the respects that Petitioners then claimed or now claim. He denied improper conduct concerning Petitioners or his Grantors. He plead laches, estoppel, the doctrine of stale demand, Texas land and other limitation statutes and the other of the defenses that are commented upon in the Court of Civil Appeals opinion. (Tr. pp. 448-474).

Respondent Athey's grandfather bought an undivided 2/7ths interest in the lands of this suit in the 1920's in the

transaction in which Frank M. Belveal and his wife purchased the interest in lands that Mrs. Belveal and her children conveyed in 1962 by the fourteen deeds that are above referred to. The interest in land that Respondent Athey's grandfather bought, descended to Respondent Athey's father in 1948. Part of the interest that Respondent Athey's father acquired later came to Respondent Athey under th probate of his father's will in 1959 (Please see the "Summary" statement that appears in Respondent Athey's brief in the Court of Civil Appeals at pp. 27-32). The May, 1961 extension of lease agreement that Respondent Athey executed in favor of Respondent Mobil was an agreement concerning lands in which Respondent then owned and held personal interest. Respondent Athey and those who delivered the fourteen 1962 deeds of this case were tenants in common during the negotiations for and the completion of the sales of interest that were then made. But such tenant in common relationship did not make Respondent a fiduciary concerning the properties in which Petitioners had interest before the delivery of the fourteen deeds. 15 Tex. Jur. 2d, Para. 8, 14, pp. 165, 175; 86 CJS Para. 71, p. 463.

Respondent Hodgden answered Petitioners' state court suit with a "not guilty" answer (Tr. p. 391) and specially plead in Paragraph 7 of such answer that Petitioner "Marion J. Belveal, came to him about selling the interest that he and his brothers and sisters sold in the land in Pecos County, Texas, that is involved by this suit. He says that the said Marion J. Belveal advised him that he and those who signed the deeds of this case would sell and convey their said interest

..... for what was to be a total consideration of $105,000.00 for all the interest that the heirs at law of Frank G. Belveal then had in said land. Before the time when the said Marion J. Belveal came to Jack D. Hodgden, those who then were the heirs at law of the above referred to Frank G. Belveal, had declined or had not accepted the $89,250.00 offer that M. C. Stickelber's letter of March 29, 1962 shown by Exhibit "D" of plaintiffs' pleading, had made for their said interests. Those who delivered the deeds that are sought to be cancelled, among themselves, had decided they wanted more money for their property than M. C. Stickelber had offered. They decided upon the price at which they would sell their respective interests. This price was stated to Jack D. Hodgden or Charles B. Athey or J. K. Brim, Jr. who determined upon the price in dollars for which a sale would be made and was made." (Tr. pp. 392-393). Respondent Hodgden also alleged in his answer that the price that was asked for and then was paid to Grantors for their deeds was a price "that then equaled, if it did not then exceed, the cash market value and price for like interest in land in the same area of Pecos County, Texas." (Para. 9, Tr. p. 394). Respondent Hodgden adopted parts of the answer that Respondent Athey had filed (Tr. p. 401) and affirmatively alleged that Respondent Hodgden had done nothing wrong and that "plaintiffs are entitled to no recovery" as against him (Tr. p. 400). Respondent Hodgden had no connection whatever with the Texas land that this suit involves or with Petitioners until at a time in 1962 when Respondent Athey and defendant Brim commissioned him to see if stock of General Royalty Corporation, a company with which

neither Athey, Brim or Hodgden or Petitioners than had connection, could be bought. Respondent Hodgden, under that commission, bought 119 shares of General Royalty's 2900 shares of stock for the equal benefit of Respondents Athey and Hodgden and defendant Brim. This purchase was made under the terms of the written agreement of date March 23, 1962 that is shown by Exhibit "D" attached to Petitioners' Fourth Amended Petition (Record Tr. p. 647) that was filed January 25, 1967 (Tr. p. 1010).

Petitioners' suit filed February 28, 1966 was brought to actual trial in January, 1967. On January 11, 1967, a jury was selected and empanelled to decide the many fact issues of the case (Tr. pp. 578, 579). That jury was then released to return into open court on the Monday that was to follow. On that Monday, the parties again appeared to start the trial of the case to completion. But another postponement in trial was then announced by the presiding trial judge. On January 25, 1967, with the trial jury still standing by but waiting, Petitioners presented and then filed a 291 page "Fourth Amended Petition" (Tr. pp. 589-871). The same day Petitioners filed the first and only motion for summary judgment that they made against Respondents Athey and Hodgden. This motion for summary judgment carried form of verification from but one Petitioner Marion J. Belveal (Tr. p. 978). Such motion for summary judgment was then answered under oath by both Respondents Athey and Hodgden (Tr. pp. 1011, 1042). Neither of such Respondents filed a motion for summary judgment as against Petitioners. They were content to stand on their answers asserting then

and now that there were and are fact issues in this case that need be decided by a jury (Tr. pp. 1011-1020; 1042-1050). March 30, 1967, the presiding judge of the state district court discharged the jury that had been chosen for this case more than two months before, and on that day a twenty page judgment was rendered (Tr. pp. 1221-1224) in Petitioners' favor. That judgment "set aside, voided and held for naught" (Tr. p. 1224) the recorded deeds which are brought forward as Exhibits "E-K" attached to Petitioners' pleadings. That judgment directed Respondents to execute deeds "containing special warranties". The reversed judgment also named a Respondent to execute and deliver a deed to "the Clerk of the Court" (Tr. p. 1239). Appeal was perfected by Respondents Athey and Hodgden from all parts of the judgment that was against them (Tr. pp. 1263-1264). Request was made for a statement from the trial judge of an amount that would be required of Respondents Athey and Hodgden as a supersedeas bond. There was no response to this request (Tr. p. 1200). An appeal bond was then filed by them (Tr. pp. 1263-1264), and their appeal was perfected. The Texas Court of Civil Appeals reversed the order that had granted Petitioners' motion for summary judgment against Respondents Athey and Hodgden. On June 12, 1968, the Texas appellate court "remanded for trial" the case whose trial had started in 1967. The Court of Civil Appeals opinion decided questions of local land and procedural law as between Petitioners and Respondents Athey and Hodgden. As will be observed from a reading of the opinion that is under attack in this Court, no mention was made of the validity of a treaty or statute

of the United States or of a ground that was repugnant to the Constitution, treaties, statutes or authority of the United States.

## ARGUMENT

***Jurisdiction:***

The statute (28 USCA 1257) provides that "Final judgments or decrees rendered by the highest court of a state in which a decision may be had, may be reviewed by the Supreme Court", "By writ of certiorari" in the instances enumerated in Section (3) of such statute. We respectfully submit that the state court judgment in this case that remands this case "for trial" as between Petitioners and the above named Respondents is an interlocutory judgment and not a final judgment or decree or one that is reviewable under the certiorari statute and this Court's rules with reference to the same. *Houston v. Moore* (1818) 3 Wheat. (U.S.) 433, 4 L. Ed. 428; *Urie v. Thompson*, (1949) 337 U.S. 163, 197, 93 L. Ed. 1282, 1293 and Annotations 89 L. Ed. 1186, ex. p. 1188 and 97 L. Ed. ex. p. 208 and 212.

***The Texas law was properly determined and then aptly applied:***

Texas cases are cited by the Court of Civil Appeals opinion that "remanded for trial" the case that exists between

Petitioners and Respondents Athey and Hodgden. In Texas the law is as was stated by the opinion of the Court of Civil Appeals. The way that law should be applied was properly stated by the opinion under attack and was stated by the Supreme Court of Texas in *Great American Reserve Ins. Co. v. San Antonio Plumbing Sup. Co.* (Tex. Sup. Ct. 1965) 391 S.W. 2d 41 that is cited as an authority at page 532 of the Texas opinion that was handed down. The *Great American Reserve Ins. Co.* case is cited by Petitioners and quoted from in an admiring way at page 26 of the Petition for Certiorari that is being answered. Admittedly the trial court judgment that was "reversed and remanded for trial" was a "summary judgment" as between Petitioners and Respondents Athey and Hodgden. Being such, the trial judge, under the *Great American Reserve Ins. Co.* opinion, was deprived of lawful right to resolve questions of probative value of the conflicting deposition testimony that was before this Court. The judge who granted the summary judgment against Respondents Athey and Hodgden was without lawful authority to resolve the summary judgment depositions and the affidavit testimony that was offered to him in a way that was favorable to Petitioners and against such Respondents Athey and Hodgden. This was stated in the *Great American Reserve Ins. Co.* case and by the other Texas Supreme Court cases that that opinion cites. The said case decided by the Supreme Court of Texas states

that all doubts as to matters of law in this case were to be resolved in favor of Respondents Athey and Hodgden. The said case also decides that no such doubts were to be resolved in favor of Petitioners. The *Great American Reserve Ins. Co.* case and the Supreme Court cases to which that case refers unmistakably state that the evidence in the record was all to be viewed in the light "most favorable" to Respondents Athey and Hodgden. The deposition evidence that favored Respondents Athey and Hodgden was required to be "accepted as true" under Texas law and Texas authorities, including *Cowden v. Bell*, (Tex. Sup. Ct. 1957) 300 S.W. 2d 286, a case that is referred to in the *Great American Reserve Ins. Co.* case. Stated another way and as was stated by the Court of Civil Appeals opinion, under *Great American Reserve Ins. Co. v. San Antonio Plumbing Sup. Co.* (Tex. Sup. Ct. 1965) 391 S.W. 2d 41, Petitioners' motion for summary judgment against Respondents Athey and Hodgden should have been denied in the state court.

The state court was in its proper field in determining as that court did that no treaty or statute of the United States or any federal matter was drawn in question by what that court decided. It is respectfully submitted that the Court of Civil Appeals opinion is right and is not subject to be reviewed by this Court.

## CONCLUSION

The Texas court properly handled and properly remanded this case for a trial on the merits. Accordingly, it is respectfully submitted that the Petition for Writ of Certiorari should be dismissed or be denied.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

Copy of the foregoing was deposited in the United States mail at Midland, Texas in a properly stamped envelope addressed to counsel for Petitioners, viz: John J. Watts, Esq., at his post office address, P. O. Box 1031, Odessa, Texas; John G. Patterson, Esq., at his post office address 2323 Houston Natural Gas Building, Houston, Texas; and Verne F. Knickerbocker, Esq., at his post office address, P. O. Box 1132, Midland, Texas, this the 27 day of June, 1969.

THIS I CERTIFY.

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